

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

PAUL ARTHUR LOPEZ,

Petitioner,

vs.

No. CIV 09-218 JB/RLP

GEORGE TAPIA, Warden, and
GARY K. KING, Attorney General for the
State of New Mexico,

Respondents.

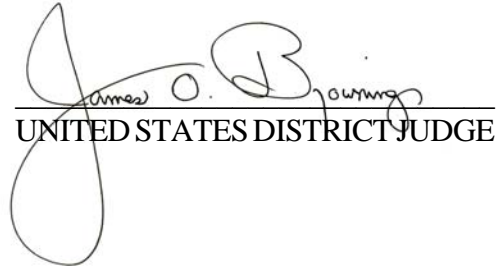
MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on: (i) Petitioner's Objections, filed June 26, 2009 (Doc. 24) to the Magistrate Judge's Report and Recommendations, filed June 18, 2009 (Doc. 23); and (ii) Petitioner's Motion to Expand the Record, filed July 1, 2009 (Doc. 26). The Court has conducted a de novo review of the record and finds that: (i) Petitioner's objections are not well taken; (ii) the Court will adopt the Magistrate Judge's Report and Recommendation; and (iii) the Court will grant the motion to expand the record.

The Court will not discuss each of Mr. Lopez' objections because the Magistrate Judge fully dealt with all of them in his report. The Court writes, however, to comment specifically on one objection. In Objection No. 1, Lopez suggests that NMRA 5-302D imposes substantive criteria that limit the state judge's discretion and that the rule creates a protected liberty interest. Lopez cannot, however, read rule 5-302 in a vacuum. Rule 5-104 gives the state court the power to enlarge the time for a preliminary hearing, and Lopez' liberty interest is limited by the right to extend the time for a hearing and the right to any preliminary hearing is limited by the state's right to pursue an indictment. And there is no right to have a preliminary hearing rather than an indictment.

Additionally, “[d]ismissal is not the proper remedy for a delay in holding a preliminary examination when prejudice to the defendant has not been shown.” State v. Tollardo, 99 N.M. 115, 115, 654 P.2d 568, 570 (citing State v. Warner, 86 N.M. 219, 221, 521 P.2d 1168, 1170 (Ct. App. 1974)). Accordingly, the Court overrules Objection No. 1.

IT IS ORDERED that: (i) the Magistrate Judge’s Report and Recommendation is adopted by the Court and this case is dismissed with prejudice; and (ii) the Petitioner’s Motion to Expand the Record is granted.



UNITED STATES DISTRICT JUDGE

Counsel and Parties:

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Plaintiff Pro se

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